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Supreme Court, U.S.
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No. 02-1624

In the Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT
AND DAVID W. GORDON,

Petitioners,

v.

MICHAEL A. NEWDOW, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE FREEDOM FROM RELIGION FOUNDATION, INC. IN SUPPORT OF THE REV. DR. MICHAEL A. NEWDOW, RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*

The Freedom From Religion Foundation, Inc. is a nationally recognized nonprofit charitable and educational corporation existing under the laws of the State of Wisconsin. The Foundation is a leading advocate promoting the constitutional separation of church and state on behalf of atheists, agnostics, and nonbelievers. The issues presented in the case at bar are of great importance to the Foundation and its constituency.[1]

In 2001, there were an estimated 29.5 million adult citizens in the United States who did not believe in god or adhere to organized religion. This constitutes more than 14% of our adult population and the number is growing.[2] THE GRADUATE CENTER, CUNY, AMERICAN RELIGIOUS IDENTIFICATION SURVEY, KEY FINDINGS, p. 3 of 20 (2001). The U.S. military includes many such nonadherents and the oft-cited adage that "there are no atheists in foxholes" is untrue. Many atheists fought with valor and faced death in World Wars I and II, Korea, Vietnam, and subsequent conflicts.

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[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. There is no parent or subsidiary company to be listed.

[2] The number of nonadherents to religion more than doubled between 1990 and 2001.

It is an affront to these citizens that their country's official pledge of allegiance includes specific reference to a divinity. Many of them want to affirm their devotion to the United States but they cannot, in conscience, declare loyalty and pay homage to a god in which they do not believe. As a consequence, they are seen as outsiders in their own country, even when they have risked their lives to defend it.

There has been an increasing intrusion of religion into this nation's body politic which is causing major divisions among our citizenry. According to the ZOGBY/REUTERS INTERNATIONAL POLL (August 11-13, 2000), there is a growing climate of intolerance in this country toward atheists and nonbelievers. Government endorsements of religion compound this problem by creating the impression that God is an integral part of our system of government and that rejecting this notion is tantamount to treason. It has thus become fashionable to condemn those who refuse to recite a formal pledge to God as "unAmerican."

The Foundation's constituency believes that "under God" in the pledge of allegiance is disrespectful to many thoughtful, churchgoing Americans who are of the opinion that the merger of God and country cheapens the religion to which they subscribe. The phrase is anathema to many devoutly religious Americans who believe in Allah, some other divinity not known to them as God, or in multiple gods. The United States is a "melting pot" of diverse cultures and religions. It is, indeed, "unAmerican" to impose upon its citizens a Judeo-Christian God as a condition of pledging fealty to their country.

It is not enough to say that those who, in conscience, cannot tolerate the oath to God are free to omit the objectionable phrase from their recitation of the pledge, or stand aside and say no pledge at all. A major purpose of the pledge is to unite Americans as "one nation indivisible" in a common bond of respect for flag and country. Belief or nonbelief in God has no part in this.

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SUMMARY OF THE ARGUMENT

The addition of the phrase "under God" to the pledge of allegiance in the mid-1950s undeniably turned a secular pledge into a prayer-like religious ritual. Pledging fealty to a divinity is an essential manifestation of religious worship. This Court has repeatedly held that conducting such rituals in an elementary or secondary public school setting violates the Establishment Clause.

This case is further exacerbated by the fact that the pledge, with its inclusion of a deity, is authored by the State and is set forth *in haec verba* in the United States Code. Thus, the pledge is not only a religious ritual, it is a ritual prescribed by government. God is not merely *endorsed* by the government; acknowledging God is *commanded* by the government. This leads to the inescapable conclusion that "under God" in the pledge renders it unconstitutional on its face.

"Under God" in the pledge of allegiance is especially harmful to nonbelieving parents who strive to pass their values and heritage on to their children. The effect of the phrase, particularly on young, impressionable children, is to interfere with parents' mentoring of their offspring. This violates parents' right to the free exercise of religion guaranteed by the First Amendment.

Every citizen has a stake in public education. That is why all taxpayers support the system regardless of whether or not they have children in the system. It is entirely inconsistent with this concept to say that only custodial parents have standing and all other taxpayers do not. Respondent Newdow is obligated to pay state taxes to support

the public school system which his daughter attends. That, alone, is sufficient to give him standing. It would be unconscionable to condition Newdow's standing on his custodial status with regard to the child.

ARGUMENT

A. THE PLEDGE OF ALLEGIANCE IS A RELIGIOUS EXERCISE WHICH IS UNCONSTITUTIONAL IN A PUBLIC SCHOOL SETTING REGARDLESS OF WHETHER OR NOT STUDENTS ARE WILLING.

If there is one point that this *amicus* wants to make above all others, it is that atheists, agnostics, and others like-minded are as sincere in their (non)religious beliefs as, for example, are Roman Catholics in the blessed sacraments, Jews in the holy Torah, or fundamentalists in the Bible. Dutiful nonbelieving parents teach their children long-held family values about atheism and religious freedom only to have the children then go to public school and hear their teachers, who are authoritarian figures, contradict this teaching by reciting a loyalty oath to God written by their own government.

We agree with the petitioners, the respondent United States, and their *amici* that government references to a divinity are "ubiquitous" in this society. But this should provide no solace for the Court, because what this means is that there is far too much religion being espoused by government. Excessive government involvement with religion is particularly sinister because it goes against the grain of the freedoms guaranteed by our Constitution which includes the freedom *not* to believe in God. *Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985) and *Everson v. Board of*

Ed. of Ewing, 330 U.S. 1, 15 (1947).[3] It also has the effect of undercutting the efforts of nonbelieving parents to pass on their values and their heritage to their children. Simply because nonbelievers are in the minority, indeed, especially because of this fact, the Court should not condone government interference with their parental rights and should strike down any effort to inculcate young children with the idea that there is or is not a god.

The lower court's dissenting opinion characterizes the issues in this case as "minuscule" and "picayune." *Newdow v. U. S. Congress*, 292 F.3d 597, 613 (9th Cir. 2002). If that is so, why did all the Senators present at the U.S. Capitol take the unprecedented step of dropping everything to protest in unison against the majority's decision?[4] Why did the decision elicit such interest across the land, including outrage from those who are intent upon promoting the concept that this a god-fearing, Christian nation? The answer is obvious -- the issue is of grave, indeed, overriding concern to those who want the pledge to remain as it is. This is a matter of great importance to those on *both* sides of the issue.

Contrary to the picture presented by those supporting it, the pledge of allegiance does not have an unblemished history. In the years before World War II, many states, including West Virginia tried to force the pledge (pre- "under

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[3] See also *Torcaso v. Watkins*, 367 U.S. 488 (1961) and *Illinois ex rel. McCollum v. Board of Ed. of School Dist. No. 71, Champaign Cty.*, 333 U.S. 203 (1948).

[4] Even the Japanese attack on Pearl Harbor did not provoke such a response.

God") upon their citizens, including those whose religious convictions prohibited them from saluting the flag and uttering loyalty oaths to secular icons. This Court held such coercion to be unconstitutional in *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943).

In 1954, in the midst of the infamous McCarthy hysteria, the U.S. Congress passed and the President signed legislation that added "under God" to the pledge.[5] Their reasoning was that communism was atheistic and, therefore, unAmerican, and that the United States had to put God on its side against this godless menace.[6] It is little wonder that, even today, nonbelievers are looked down upon by many of the religious majority.

With the addition of "under God," the pledge of allegiance has placed nonbelievers completely out of the mainstream. Patriotic, taxpaying citizens are isolated from

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[5] Two years later, legislation was enacted (36 U.S.C. § 186) making "In God We Trust" our national motto. Congressman Bennett of Florida, who introduced and managed the legislation in the U.S. House of Representatives, stated: "At the base of our freedom is our faith in God and the desire of Americans to live by His will" and "As long as this country trusts in God, it will prevail." 101 CONG. REC. 4384 (1955).

[6] Apparently, some of our legislators had forgotten that, in the sixty plus years before the pledge was changed to include a reference to a divinity, the United States was victorious in two world wars, had survived a major depression, split the atom, was instrumental in forming the United Nations, and emerged as the most powerful nation on earth.

the society merely because they do not happen to believe in a divinity, a right which is guaranteed to them under the Constitution. *Wallace v. Jaffree, supra*, and *Everson v. Board of Ed. of Ewing, supra*, and cases cited in footnote 3.

The arguments advanced by the petitioners, the United States, and their allies supporting "under God" in the pledge of allegiance are shameful and, in the end, self-defeating. There is page after page of rhetoric about how this nation has such a rich religious history. No acknowledgment is made of the equally rich history of atheism, agnosticism, and nonbelief. No time is spent emphasizing the fact that, because of the genius of the founders of this nation and their sincere belief that government and religion ought to be separate, religion has thrived in this country like nowhere else on earth.

Ignored is the fact that, although most, if not all, of the framers of our Constitution were deists, they carefully and deliberately authored a document that established a government of the People and did not mention, much less subordinate it to a divinity. To be sure, some documents from American history, such as the Declaration of Independence, the Gettysburg address, etc., make specific reference to a god. But that is not what this government was founded on. The framers were intelligent enough to realize that for this nation to truly be free, they would need to put aside their personal religious preferences in favor of a secular government. They were painfully aware of the abysmal history of societies that mixed religion with civil governance. They had had enough of state-sanctioned religions and all their attendant evils.

The historical documents and practices cited by the petitioners and their allies that refer to a divinity cannot be equated with the pledge of allegiance. It is pure sophistry to assert that, if this Court outlaws the pledge of allegiance as currently worded, it will somehow make the Declaration of Independence or the Gettysburg address off-limits in public schools. These are documents which form a part of this nation's history and are properly the subject of public school education.

The pledge of allegiance is entirely different. It is not "educational." It is a loyalty oath. To have God added to that oath offends our Constitution and the freedoms this country stands for. To force nonbelievers either to indulge in hypocrisy and voice the pledge or make them stand aside from the majority in silence is a Hobson's choice that is repugnant to our heritage of freedom. Certainly, for grade school students who are years away from adulthood, this can hardly be called a "willing" exercise.[7] If the custodial mother in this case wants her daughter to pledge an oath to God, let it be done at her home or in a church, not under the influence of a government-prescribed setting.

In recent years, the judiciary has adopted an increasingly accommodating attitude toward religion. In doing so, we question whether sufficient attention has been given to the other side of the issue, i.e., freedom *from* religion for atheists, agnostics, and nonbelievers. Prevailing thought seems to be that the latter are entitled to no accommodation

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[7] By definition, children in elementary school and most high school children cannot be "willing students" because they have not yet reached the age of consent.

whatsoever and that a secular nation is, by definition, hostile to religion.

Nonbelievers do not take the position that government should be hostile to religion. It is not contended that the pledge of allegiance should affirmatively say that this is *not* one nation under God or that the national motto should be "In God we do *not* trust."[8] Nonbelievers simply seek balance — and balance is best struck by neutrality. Even if one were to subscribe to the theory that accommodation can be neutral, eare must be taken to avoid it from tipping over into favoritism.

The pledge of allegiance, as currently phrased, favors religion and is punitive to nonbelievers. The addition of "under God" has made the pledge a prayer-like religious ritual whereby impressionable schoolchildren publicly stand *en masse* and declare loyalty to a nation under and, therefore, subservient to God. This violates a long line of decisions by this Court which extend over sixty years.

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[8] In 1994, this *amicus* commissioned a survey which was conducted by an independent research firm. The results of that survey, which polled a representative cross section of the American public, showed that over 70% of the respondents were of the opinion that "In God we Trust" constituted endorsement of a belief in God. Yet, "In God we Trust" remains this country's national motto. For the Court's information, a copy of the survey results is attached hereto as Appendix A. CHAMBERLAIN RESEARCH CONSULTANTS, SURVEY RE: "IN GOD WE TRUST" (May 18-23, 1994).

In *Everson v. Board of Ed. of Ewing*, 330 U.S. 1 (1947), Mr. Justice Black, speaking for the Court, spelled out basic principles applicable to the Establishment Clause including the right of every citizen to be free from government coercion to "profess a belief or disbelief in any religion." *Id.* at 15. In the almost sixty years which have elapsed since *Everson*, the Court has not budged from this bedrock principle.

Fifteen years after *Everson*, the Court struck down a public school prayer authored by a local board of education. It rejected the argument that non-denominational prayer was permissible under the Establishment Clause and it likewise rejected the contention that, because pupils were not required to recite the prayer, Establishment Clause prohibitions did not apply. *Engel v. Vitale*, 370 U.S. 421 (1962).

This line of cases culminated in *Lee v. Weisman*, 505 U.S. 577 (1992) in which the court held that a private prayer delivered by a rabbi at a public school commencement was unconstitutional and *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000) where the Court struck down a student-led prayer recited before a public high school football game. In each case, the Court held that a finding of coercion was unnecessary in evaluating the constitutionality of public school prayer.

These decisions are not limited to the technical definition of prayer. The Court has included within the ambit of Establishment Clause jurisprudence not only prayer but the transmission of "...religious beliefs and religious expression..." *Lee v. Weisman*, 505 U.S. at 589, or anything which "...establishes a (state) religion or religious faith, or tends to do so." *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984),

quoted in *Santa Fe Independent School Dist. v. Doe, supra,* at 302. In essence, the Court has put these factors on the same footing as prayer.

Without question, the pledge of allegiance, with its inclusion of a deity is a religious expression and it establishes, or tends to establish, a religion. It is authored by the state, is codified in federal law (4 U.S.C. § 4), and must be recited *in haec verba* in public schools under the jurisdiction of the Elk Grove Unified School District. God is not merely *endorsed* by government; acknowledging God is *required* by the pledge. The United States is declared to be *under* and, therefore, *subservient* to God. This is absolutely repugnant to the Constitution. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Petitioners argue that the pledge is not a prayer because it "... (cannot) be construed to be a supplication for blessings from God nor can it be reasonably argued that it is a communication with God." Petitioners' brief, p. 31. *Amicus* for the United States makes a similar contention to support the thesis that the pledge is not the "functional equivalent of prayer." Brief for the United States, p. 43. These arguments constitute a misreading of the Court's decisions. The Court has not preoccupied itself with prayer. Rather, it has looked more broadly at the question of whether a challenged activity is a religious practice or would establish or tend to establish a religion. *Lynch v. Donnelly, supra.* The Court has given recognition to the fact that it would be putting form over substance to say that prayer is a religious exercise

that the Establishment Clause reaches but affirmations of belief in and/or allegiance to God are not.[9]

WEBSTER'S ENCYCLOPEDIC DICTIONARY (1990) defines (1) pledge as "a solemn promise," (2) allegiance as "devotion, loyalty, the duty of a subject to his sovereign," and (3) worship as "homage paid to God." From these definitions, it becomes obvious that the pledge of allegiance at issue is, in reality, an act of worshiping a deity. Subservience is the hallmark of the relationship between God and those who worship God. This dovetails with the pledge of "one nation *under* God" clearly signifying that God is master and this nation is the servant. It is the very antithesis of our Constitution which bases the United States government on the authority of "WE, THE PEOPLE."

Whether it is a prayer, an act of worship, or merely a religious exercise, "under God" in the pledge of allegiance puts the United States in direct confrontation with citizens who do not believe in a divinity. It is an inapt phrase in a pledge whose purpose should be to unite, not divide, the nation. It should be struck down by this Court.

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[9] THE APOSTLES' CREED, attached hereto as Appendix B, is the major statement of faith in the Roman Catholic Church and is repeated in every mass. It would not meet Petitioners' and the United States' definitions of "prayer" because it is only a declaration of belief and not a "communication" with God. However, no one would seriously argue that it would be constitutionally acceptable to have teachers leading students in reciting this creed in a public school setting. The pledge of allegiance is more offensive to the Constitution than the Apostles' Creed because it not only implies a belief in God, but it is also an oath of fealty to God.

B. RESPONDENT NEWDOW HAS STANDING.

Respondent Newdow was found to have standing by the Court below and this Court should not disturb that finding. At issue is a religious practice required by the law of the state in which Newdow resides and pays taxes. This alone is sufficient to confer standing without regard to whether Newdow has custody of the child in question or even has a child enrolled in the public school system. *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 3.

Every citizen has a stake in public education. That is why the system is supported by all taxpayers, not just taxpayers who have children enrolled in school. To hold that standing is limited to those who actually have custody of a child in public school is inharmonious with the principles on which public education in this country is based. It would serve to disenfranchise taxpayers who are obligated under law to subsidize the school system merely because they are childless. Curricula could include instruction that glorifies Nazism and such taxpayers would be powerless to seek redress in the courts.

Respondent Newdow is the biological parent of the student involved and he is under a State court order to support the child. Even though he may not have custody, that is not pertinent to the issues before the Court. Newdow has every right to object to school programs which he deems unlawful regardless of what the custodial mother may say. He is not stripped of his constitutional rights merely because of a State court's custody order.

Newdow also has the right to take every reasonable step to pass on his values to his daughter even if they do not

conform to those of the custodial mother.[10] Government infringement of that right meets the criterion for "injury" required by the Court's decisions in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982) and *Allen v. Wright*, 468 U.S. 737, 751 (1984). Newdow is not asking this court to control what the mother teaches the child, but to control what the father finds constitutionally objectionable in the public school system.

CONSENT OF PARTIES

This brief is accompanied by the written consent of the parties pursuant to Supreme Court Rule 37.3(a).

CONCLUSION

Wherefore, it is respectfully submitted that this Court affirm the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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February, 2004

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[10] The mother, of course, is entitled to do the same.

AFFIDAVIT OF SHARON R. CHAMBERLAIN

I, Sharon R. Chamberlain, being duly sworn, do hereby make the following affidavit:

1. I am the President and sole owner of Chamberlain Research Consultants. I have been in the polling business since 1988.

2. Chamberlain Research Consultants (CRC) is an independent, full-service market research firm. We are located at 4801 Forest Run Road in Madison, Wisconsin and have been in business since 1988. The firm has been solely owned by me since June of 1990; prior to that, it was a branch of Matousek and Associates, where I was a partner.

3. Wisconsin Interviewing Services (WIS) is the field service owned by CRC. The field service includes a phone bank and focus group facility. WIS is responsible for the actual collection of data. CRC is responsible for research design and analysis. CRC/WIS employs approximately six full-time and 25 to 50 part-time people at any given time.

4. CRC/WIS clients include: school districts, utility companies, political candidates, lobbyists, restaurants and food manufacturers, trade associations, ad agencies and design firms, marketing firms, insurance companies, government agencies, law firms, new product developers, newspapers, and radio stations.

5. CRC was contracted by the Freedom From Religion Foundation, Inc. to conduct a poll on the use of the phrase "In God we Trust" as seen on U.S. currency. The poll was conducted with 900 adults across the nation. The number

of surveys was chosen to provide a sufficient margin of error, in other words, approximately ±3%.

6. CRC purchased a random sample telephone list from Scientific Telephone Samples (STS) in California for use in this study. STS was instructed by CRC to draw the numbers proportionately to population across all 50 states. The sample was generated so that unlisted phone numbers were not excluded from the sample.

7. Quotas were set for gender based on the most recent U.S. Census data available (1990: 52% female, 48% male). The gender constraints were placed on the sample because past experience has shown us that the proportion of women who answer the telephone is higher than the actual proportion of women in the population.

8. The poll was in the field May 18-23, 1994. All surveys were conducted from a supervised phone bank. Over 10% of the interviews were monitored by a supervisor through our special phone system, and/or called back for transcription verification. Over 10% of the keying-in data entry was also verified.

9. Among the employees of CRC and WIS who assisted with this survey, in addition to me, were: Janeen Potts, Interim Field Service Director; Rod Padley, Supervisor; Ryan Randall, Supervisor; and Nicole Wyrembeck, Senior Analyst.

10. Attached as Exhibit A is the survey form with raw data, exact questions and their responses.

11. This poll establishes that the majority of those surveyed believe that the phrase "In God we Trust" is religious, as opposed to non-religious, and endorses a belief in God. As for endorsing religion over atheism, almost 11% of the respondents did not choose yes or no. Of those who did give an opinion, the majority agreed that the phrase does endorse religion over atheism.

12. The margin of error for this poll was ±3.22% at the 95% confidence level.

13. This poll was conducted in accordance with generally accepted standards in the industry.

Further, the affiant sayeth not.

Sharon R. Chamberlain

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Subscribed and sworn to before me this 14th day of September, 1994.

Jacklyn M. Sande
Notary Public

My commission expires: 2-19-97.

MOTTO TEST: Raw Data

Job #132 Sex: Male Female
May 18-23, 1994 48% 52%
Sample Size = 900
Margin of error: ±3.22%

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Hello, this is _____ from Chamberlain Research. Tonight we're doing a one minute survey with people across the nation. Am I speaking with someone who is over the age of 18? (If not, ask to speak with someone who is, terminate if none).

The United States is currently working on redesigning US currency. The topic of my three questions is the motto "In God we Trust," as seen on US currency.

1. Is "In God we Trust" religious or non-religious?

Religious	550	61.1%
Non-religious	271	30.1%
Don't know	79	8.8%

2. Does "In God we Trust" endorse a belief in God?

Yes	641	71.2%
No	217	24.1%
Don't know	42	4.7%

3. Does "In God we Trust" endorse religion over atheism?

Yes	480	53.3%
No	322	35.8%
Don't know	98	10.9%

EXHIBIT A

THE APOSTLES' CREED

I believe in God, the Father Almighty,
the Creator of heaven and earth,
and in Jesus Christ, His only Son, our Lord:

Who was conceived of the Holy Spirit,
born of the Virgin Mary,
suffered under Pontius Pilate,
was crucified, died, and was buried.

He descended into hell.

The third day He arose again from the dead.

He ascended into heaven
and sits at the right hand of God the Father Almighty,
whence He shall come to judge the living and the dead.

I believe in the Holy Spirit, the holy catholic church,
the communion of saints,
the forgiveness of sins,
the resurrection of the body,
and life everlasting.

Amen.